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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 478

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,

Plaintiffs-Appellants,

—and—

MILTON M. COHEN,

Intervening Plaintiff-Appellant,

—v.—

HON. EDWIN E. WILLIS, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of Amicus

The American Civil Liberties Union appears with the consent of the parties. The Union is a non-partisan organization devoted entirely to the protection and advancement of constitutional rights. It adheres firmly to the conception that democratic processes cannot function without

the free and full exercise of those rights. It has no other program. In this sense ACLU is counsel for principle.

Questions Presented[1]

(1) Whether the acts of the House Un-American Activities Committee, which appellants allege in their complaint, constitute an unconstitutional application of Rule XI

(2) Assuming the allegations of the complaint are proved, whether declaratory and injunctive relief are appropriate—

(a) as to Committee member defendants;

(b) as to the non-Committee defendants, whose duties include implementing Committee power through contempt prosecutions.

Statement of the Case

In their complaint below, appellants claim in substance that they can prove that Rule XI[2] as applied by the House Un-American Activities Committee is unconstitutional; that such conduct is manifested, for example, by the use of hearings, and news leaks before hearings, to expose witnesses (including appellants) to public scorn for exposure's sake; by asking questions of unfriendly witnesses to which it already knows the answers; by forcing witnesses it knows

[1] Appellants' Jurisdictional Statement presents many significant points in addition to those discussed in this brief. In addressing ourselves solely to the procedural point and one substantive issue, we do not mean to depreciate the substantiality of the remaining issues.

[2] Legislative Reorganization Act of 1946, 60 Stat. 812, 828.

to be unfriendly to assert publicly the privilege against self-incrimination; by demeaning witnesses and witnesses' lawyers; by attacking persons and organizations which oppose the Committee or national security agencies; by reviving old allegations against unfriendly witnesses to no apparent purpose; and by persuading employers of unfriendly witnesses to punish them economically for their recalcitrance and for their political views. It is claimed further that all of this neither has nor can have any legitimate legislative purpose.

The Questions Are Substantial

I.

The claimed actions of the Committee raise the substantial question whether Rule XI is constitutional as applied.

There is no question but that the actions which appellants claim are characteristic of the Committee's efforts represent arbitrary, unreasonable and unconstitutional applications of the otherwise legitimate legislative power to investigate. It is settled that an otherwise valid statute may be nullified by such application. *Fiske* v. *Kansas,* 274 U. S. 380, 385, 387 (1927); *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539, 566 (1963) (Douglas, *J.,* concurring). It follows, *a fortiori,* that a Rule of the House of Representatives so applied does not meet constitutional standards. What the Congress cannot do by statute, one of its Houses cannot do by Rule. Compare *Kilbourn* v. *Thompson,* 103 U. S. 168, 182 (1880).

Barenblatt v. *United States,* 360 U. S. 109 (1959), does not impair this conclusion. Indeed, it lends it support, for *Barenblatt,* while upholding Rule XI against claimed unconstitutional vagueness on the facts of *that* case, specifically noted that "there is no indication in this record that the subcommittee was attempting to pillory witnesses." 360 U. S. at 134. Thus the Seventh Circuit, in *Stamler* v. *Willis,* 371 F. 2d 413 (1966), noted that the complaints in the present case alleged just such "pillorying" of the appellants and others under Rule XI as "continually interpreted by the Sub-committee. . . . " (App. 25, Jurisdictional Statement). Likewise, the Court pointed out in *Gojack* v. *United States,* 384 U. S. 702, 706 (1966) that:

> "In the circumstances of that case [Barenblatt], the Court sustained the constitutionality of the investigation. . . . "

Accordingly, if appellants can prove the facts they allege, no legitimate legislative activity[3] is involved, the Speech and Debate Clause (U. S. Constitution, Article I, §6, Cl. 1) does not immunize the conduct alleged, and the question of remedy is relevant.

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[3] Compare *Tenney* v. *Brandhove,* 341 U. S. 367, 376, 377 (1951) and *Kilbourn* v. *Thompson, supra,* at 204-205.

II.

Declaratory judgment and injunctive relief are appropriate remedies.

a. *As to the Actions of the Committee Members*

Dombrowski v. *Pfister*, 380 U. S. 479 (1965), concluded that irreparable injury justified injunctive relief to prevent criminal prosecutions resulting from legislative excesses where the defense of the criminal cases would not adequately vindicate constitutional rights and where a substantial loss of freedom of expression would occur pending ultimate review of adverse decisions. *Dombrowski* v. *Pfister*, 380 U. S. at 485-486. The relevance of that holding is strengthened by the fact that *Dombrowski* was concerned with potential prosecutions while the case at bar involves both (1) present and long continuing harm to individuals through Committee action and (2) pending contempt proceedings for resistance to such action. Under such special circumstances the irreparable injury is the more apparent because of the immediacy of harm to be implied from the facts which appellants offer to prove, and from the pendency of contempt actions. See *Dombrowski* v. *Pfister*, 380 U. S. at 486.

In the present case the facts alleged remove the Committee defendants from the protection of the Speech and Debate Clause. Moreover, the special circumstances present in the harassment and pursuit of witnesses quicken the remedies sought (i.e., declaratory judgment and injunctive relief) as to them.

In connection with standing to sue for injunctive and declaratory relief in *Dombrowski* this Court said:

"Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." 380 U. S. at 486.

The effect of *Dombrowski* is to authorize injunctive relief against anticipated prosecution where First Amendment activity is adversely affected and protection cannot be secured piecemeal in criminal prosecutions.

In *Bond* v. *Floyd,* 385 U. S. 116, 128-137 (1966), this Court upheld injunctive relief against a majority of the members of the Georgia legislature in face of a claim that the provisions of the Georgia Constitution giving each House the right to judge the qualification of its members barred the action. Free speech considerations overbalanced the local legislative concern for untrammeled legislative action. There is no distinction in principle between *Dombrowski* and *Bond,* and the case at bar which justifies a denial of the same relief here should the appellants make their actual case.

These appellants are already being penalized by the obloquy of exposure, adverse innuendo and harassment,

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[4] The defendants were the Governor, police and law enforcement officers, and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana. 380 U. S. at 482. The Court directed the prompt framing of a decree restraining prosecution, ordering immediate return of seized papers, and prohibiting further acts of enforcement of void sections. More precise terms and the identity of persons to be enjoined were left to the District Court after hearing on remand. 380 U. S. at 497-498. Apparently the speech and debate issue was not raised.

and by pending contempt proceedings. The circumstances pose immediate penalties for and threats to the exercise of First Amendment rights that go beyond the chilling effects in *Dombrowski*. For these reasons there is an inadequate remedy at law and the remedy sought is appropriate.

b. *The Non-Committee Defendants*

Without relinquishing the conclusion that declaratory judgment and injunctive relief against the Committee defendants find support in both *Dombrowski* and *Bond*, the appellants need not rest their whole remedial hope upon keeping the Committee defendants in the lawsuit. The majority below immunized the non-Committee defendants by too simple an expedient. The majority simply held that the relief sought against the prosecutor-defendants—the Attorney General and the United States Attorney—were "ancillary" to the claims against the Congressional defendants. Dismissal followed without further explanation. Should this view prevail, it is difficult to imagine any circumstances under which the conduct of admittedly unconstitutional legislative action could be curtailed—however much that conduct impaired vital rights of individuals—without submission to the hazards of a criminal proceeding.

The majority below ignored the compelling precedents in this Court for inhibiting by injunction the ancillaries of Congressional defendants even when speech and debate considerations shielded the legislators. Long ago in *Kilbourn* v. *Thompson, supra,* where, although the legislators were *not* found to have engaged in conduct "of an extraordinary character" lifting the speech and debate immunity, liability for false imprisonment was posited, if proved, upon

the Sergeant-at-Arms of the House. Much more recently the point was reaffirmed in *Dombrowski* v. *Eastland*, 387 U. S. 82, 84-85 (1967), where it was held that counsel for a United States Senate Subcommittee could be required to defend a tort action growing out of Subcommittee activity even though a member of the Senate could not.

Accordingly, it is clear that ancillaries may be held liable even when Congressional principals are shielded by the Speech and Debate Clause.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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September 1968